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No. 76-1598

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1976

STANDARD FORGE AND AXLE COMPANY, INC., PETITIONER

v.

BROCK ADAMS, SECRETARY OF THE DEPARTMENT OF
TRANSPORTATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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On November 12, 1974, the Secretary of Transportation issued Federal Motor Vehicle Safety Standard No. 121¹ pursuant to Section 103(a) of the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 719, 15 U.S.C. 1392(a), which provides that such standards shall be practicable, meet the need for motor vehicle safety and be stated in objective terms. Motor Vehicle Safety Standard No. 121 pertained to air brake systems and became effective on January 1, 1975.

Section 105(a)(1) of the Act, 80 Stat. 720, 15 U.S.C. 1394(a)(1), provides that in case of a controversy as to the validity of any order issued under 15 U.S.C. 1392,

¹49 C.F.R. 571.121 (1974), as amended by 39 Fed. Reg. 39880.

any person adversely affected may within 60 days after such order is issued "file a petition with the United States court of appeals *** for a judicial review of such order."² Section 105(a)(6) further states that the remedies provided by the subsection are "in addition to and not in substitution for any other remedies provided by law." 15 U.S.C. 1394(a)(6).

Following the denial by the Administrator of the National Highway Traffic Safety Administration of petitioner's application to repeal the standard, petitioner filed this action on June 17, 1975, in the United States District Court for the District of Columbia (Pet. 4; Pet. App. 3a). It sought (1) a declaration that Federal Motor Vehicle Safety Standard No. 121 exceeded the Secretary's statutory authority, (2) an order setting aside the Standard, and (3) an injunction against the Secretary's enforcement of the Standard (Pet. 4-5). On motion of the Secretary, the district court dismissed for lack of subject-matter jurisdiction, relying upon *Nader v. Volpe*, 466 F. 2d 261 (C.A. D.C.) (Pet. App. 1a). The court of appeals affirmed (Pet. App. 2a-5a).

I. The court of appeals correctly held that the provision in Section 105(a)(1) of the Act for court of appeals review of safety standards provides the exclusive method for judicial review of those standards, and that the district court therefore properly dismissed the suit. In *Nader v. Volpe, supra*, involving the same statute, the court of appeals held that the district court did not have jurisdiction to review the validity of a Federal Motor Vehicle Safety Standard, because Section 105(a)(1) provided the sole means to review "administrative proceedings under the National Traffic and Motor Vehicle

Safety Act of 1966 *** [and] [t]hat route *** is a petition to a court of appeals for review of the action complained of" (466 F. 2d at 268; footnote omitted).³ That decision is in accord with the rule that where Congress "has enacted a specific statutory scheme for obtaining review, *** the statutory mode of review [must] be adhered to notwithstanding the absence of an express statutory command of exclusiveness." *Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411, 422. See also *UMC Industries, Inc. v. Seaborg*, 439 F. 2d 953, 955 (C.A. 9); *United States v. Southern Railway Co.*, 364 F. 2d 86 (C.A. 5), certiorari denied, 386 U.S. 1031.

The preservation of "other remedies provided by law" in Section 105(a)(6) is not "a license to resort to nonstatutory remedies in the District Court ***" (*Nader v. Volpe, supra*, 466 F. 2d at 271). It merely preserves nonstatutory remedies, as does Section 10 of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, where agency action is "*ultra vires* or damaging beyond the capability of the statutory procedure to repair" (*ibid.*). Although petitioner frames its case in terms of the Secretary having exceeded his authority, basically it makes the precise type of challenge to the Secretary's action that Section 105(a) was intended to cover, *i.e.*, that the

²The court also stated (466 F. 2d at 266; footnotes omitted):

Generally, *** when Congress has specified a procedure for judicial review of administrative action, courts will not make nonstatutory remedies available without a showing of patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily-prescribed method of review ***.

Standard is invalid because it allegedly does not relate to motor safety. The statutory review procedure provides a remedy that is fully adequate.

2. Petitioner's reliance on *Abbott Laboratories v. Gardner*, 387 U.S. 136, is misplaced. Although the statutory judicial review provisions there involved were similar to Section 105(a), the particular administrative action for which plaintiff sought review in *Abbott* was not reviewable pursuant to those procedures. Since the court held that the administrative action was reviewable, the district court necessarily had jurisdiction. The Court pointed out, however, that "when the special [review] provisions apply, presumably they must be used * * *" (387 U.S. at 146). See *Nader v. Volpe*, *supra*, 466 F. 2d at 271-272 n. 68; *UMC Industries, Inc. v. Seaborg*, *supra*. In the present case, since the statutory procedure for court of appeals review was available to challenge the Safety Standard, there was no occasion to resort to the district court.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.,
Solicitor General.

JUNE 1977.